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Nos. 97-1943 and 97-1992

In the Supreme Court of the United States

OCTOBER TERM, 1998

KAREN SUTTON AND KIMBERLY HINTON, PETITIONERS

v.

UNITED AIR LINES, INC.

VAUGHN L. MURPHY, PETITIONER

v.

UNITED PARCEL SERVICE, INC.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the determination that a person has an actual disability within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. 12102(2)(A), must be made without regard to mitigating measures, such as medicines or prosthetic devices.

2. No. 97-1992 only: Whether an employer that terminates an employee solely because it believes the employee does not satisfy physical criteria established by a third party such as a government regulatory body could be found to have terminated the employee because the employee was "regarded as having" a disability within the meaning of 42 U.S.C. 12102(2)(C).

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's orders inviting the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. *Sutton* v. *United Air Lines.* The district court dismissed the complaint filed by petitioners Karen Sutton and Kimberly Hinton, on the ground that it failed to state a claim on which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). The court of appeals affirmed.

a. The complaint alleged that petitioners, who are identical twin sisters, sought commercial pilot positions with respondent in 1992. Amended Compl. at 4. Petitioners alleged that they were regional airline pilots at the time, and that they amply satisfied the basic age, education, experience, and FAA certification qualifications for a pilot's job with respondent. *Id.* at 3. They claimed that respondent granted them interviews for pilot positions, but that respondent informed each of them at the time of the interview that their uncorrected vision did not comply with respondent's minimum requirements. *Id.* at 4, 6. Petitioners alleged that respondent "rejected [petitioners] on the basis of their disability, or because [respondent] regarded [petitioners] as having a disability." *Id.* at 9.

With respect to the details of their vision, each petitioner alleged that her uncorrected eyesight is 20/200 or worse in her right eye and 20/400 or worse in her left eye, but each petitioner also alleged that "[w]ith the use of corrective lenses, [she] has vision that is 20/20 or better." Amended Compl. at 6. They alleged that, without corrective lenses, each of them "effectively cannot see to conduct numerous activities such as driving a vehicle, watching television or shopping in public stores." *Id.* at 7. They also alleged, however, that "[w]ith corrective measures, * * * [each of them] function[s] identically to individuals without a similar impairment." *Ibid.*

b. The district court ruled that petitioners had failed to state a claim upon which relief may be granted. 97-1943 Pet. App. A27-A37. Under the ADA:

> The term "disability" means, with respect to an individual —

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. 12102(2).

The district court first examined the existence of an actual limiting impairment under clause (A). The court noted that "numerous federal courts have concluded that the need for corrective eyewear is commonplace and does not substantially limit major life activities," 97-1943 Pet. App. A32, and that petitioners therefore "have not stated a claim that they are substantially limited in the major life activity of seeing." *Id.* at A33. The court also held that petitioners' "common moderate vision impairment * * * does not substantially limit their ability to work within the meaning of the ADA." *Id.* at A34. In the court's view, "the ADA was intended to protect only a limited class of persons; specifically individuals who suffer from impairments significantly more severe than those encountered by the average person in everyday life, not people who suffer from slight shortcomings that are both minor and widely shared." *Id.* at A35.

The district court also held that petitioners had failed to state a claim that respondent "regarded" them as disabled under clause (C) of the disability definition. The court stated that "[t]he statutory reference to a substantial limitation indicates that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved." 97-1943 Pet. App. A36-A37. In the court's view, "[a]t

most, [petitioners] can establish that [respondent] regarded them as unable to satisfy the requirements of a particular passenger airline pilot position." *Id.* at A37. The court added that petitioners "have had no difficulty obtaining other jobs in their field prior to this one." *Ibid.*

c. The court of appeals affirmed. 97-1943 Pet. App. A1-A25. Guided by the EEOC's regulatory definition of "impairment," under which "[t]he existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices," 29 C.F.R. Pt. 1630 App. § 1630.2(h) para. 2, the court held that petitioners had adequately alleged that they suffered from an "impairment" of vision under the ADA. 97-1943 Pet. App. A9-A11. The court held, however, that "[t]he determination of whether an individual's impairment substantially limits a major life activity should take into consideration mitigating or corrective measures utilized by the individual." *Id.* at A16. The court concluded that "while [petitioners'] uncorrected vision would undoubtedly 'substantially limit' their major life activity of seeing," they "can prove no set of facts upon which relief may be granted" because their vision is correctable. *Id.* at A17-A18.

The court also held that they had not set forth a claim upon which relief could be granted under the "regarded as" prong of the statute. The court stated that "in order to establish a disability under the 'regarded as' prong of the ADA with respect to the major life activity of working, an individual must show that the employer regarded him or her as being substantially limited in performing either a class of jobs or a broad range of jobs in various classes." 97-1943 Pet. App. A21. Although the court accepted as true petitioners' allegation

that they "were disqualified from 'all pilot positions' as they alleged in their Amended Complaint," the court nonetheless held that petitioners "cannot show disqualification from a 'class of jobs.'" *Id.* at A22.

2. *Murphy* v. *United Parcel Service, Inc.* The district court granted summary judgment to respondent on petitioner's claim under the ADA. The court of appeals affirmed.

a. Petitioner has had high blood pressure (hypertension) since he was ten years old. For 22 years, petitioner worked as a mechanic. Despite the fact that his blood pressure was very high (approximately 250/160, see 97-1992 Pet. App. 9a), it was controlled by medication. His own physician and respondent's physician both testified that, with medication, petitioner's "hypertension does not significantly restrict his activities and that in general he can function normally and can engage in activities that other persons normally do." *Id.* at 13a.

In August 1994, respondent hired petitioner as a mechanic—a job whose functions include driving commercial motor vehicles on "road tests" and "road calls," and which therefore requires satisfaction of Department of Transportation requirements. 97-1992 Pet. App. 14a. Among those requirements is that the driver of a commercial motor vehicle "[h]as no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely." 49 C.F.R. 391.41(b)(6). The district court construed a subsequent DOT publication to provide that "in order to be physically qualified to drive a commercial motor vehicle * * *, an individual must maintain

blood pressure less than or equal to 160/90." 97-1992 Pet. App. 16a.[1]

At the time he was hired, petitioner's blood pressure was measured as 186/124. 97-1992 Pet. App. 16a. In September 1994, respondent realized that petitioner had not satisfied the 160/90 standard, and petitioner was retested; his blood pressure was approximately 160/104. See 97-1992 Pet. 2. Petitioner's treating physician "testified that [petitioner] is unable to use medication to reduce his blood pressure below 160/100 without suffering severe side effects." 97-1992 Pet. App. 16a. On October 5, 1994, respondent fired petitioner. *Id.* at 16a-17a.

b. The district court held that, for purposes of determining whether petitioner had shown that he had a disability, his "impairment should be evaluated in its medicated state." 97-1992 Pet. App. 29a. The court noted that "[t]he only limitation specifically set by [petitioner's] treating physician" was a restriction on repetitive lifting of items weighing 200 pounds or more. *Id.* at 31a. The court stated that such a limitation "is not of such a nature as to significantly restrict him in his ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities," and that therefore petitioner's "high blood pressure and its concomitant effects do not constitute a disability under the ADA." *Ibid.* The court also concluded that "[respondent] did not regard [petitioner] as disabled, but only that he was not certifiable under DOT regulations." *Id.* at 32a. Finally, the district court concluded that petitioner was not qualified for the job,

[1] Both courts below misconstrued the import of the DOT regulations. See note 5, *infra*.

id. at 33a-35a, that in any event respondent's compliance with DOT regulations was a complete defense to petitioner's ADA claim, *id.* at 35a-37a, and that any accommodation by respondent to petitioner's condition "would have been an undue hardship on [respondent]," *id.* at 37a.

c. The court of appeals affirmed, in an unpublished opinion. 97-1922 Pet. App. 1a-6a. The court noted that petitioner's own doctor had testified that "when his high blood pressure is medicated, he 'functions normally doing everyday activity that an everyday person does.'" *Id.* at 4a. Relying on its holding in *Sutton* that the "substantial limitation" inquiry should assess the individual after mitigating or corrective measures are taken, the court held that petitioner's high blood pressure is therefore not a disability. *Ibid.*

The court of appeals also affirmed the district court's ruling that respondent did not regard petitioner as having an impairment that limits a major life activity. The court stated that "[respondent] did not base its termination of [petitioner] on an unsubstantiated fear that he would suffer a heart attack or stroke," but "because his blood pressure exceeded the DOT's requirements for drivers of commercial vehicles." 97-1992 Pet. App. 5a. In the court's view, it followed that respondent "in its termination decision, did not regard [petitioner] as having an impairment that substantially limits a major life activity." *Ibid.* The court expressly declined to reach the questions whether petitioner was "otherwise qualified" for the job under the ADA, *ibid.*, and whether the DOT regulations would provide a defense to petitioner's ADA claim. *Id.* at 5a-6a.

DISCUSSION

Both *Sutton* and *Murphy* present the basic question whether the existence of an actual disability under the ADA is to be assessed with or without taking into consideration mitigating or ameliorative measures employed by the individual involved. The courts of appeals are divided on that issue; at least six circuits have held, consistently with the legislative history and authoritative regulatory construction of the ADA, that mitigating measures should not be taken into account. Two courts of appeals, including the Tenth Circuit in these cases, have held that mitigating measures should be taken into account. The issue on which the courts of appeals are divided is a significant one, and further review by this Court to resolve the conflict is therefore warranted. Although the question of mitigating measures is presented by both *Sutton* and *Murphy*, the courts of appeals have tended to view correctable vision impairments like those at issue in *Sutton* as special cases. Because *Murphy* thus presents the mitigating measures issue in a context that is likely to lead to a more general resolution of the issue, *Murphy* provides a better vehicle for the Court to address the mitigating measures issue. In addition, if further review is granted with respect to the mitigating measures issue in *Murphy*, the Court may well benefit from the opportunity to review that issue in the broader context that would be provided by reviewing as well the Tenth Circuit's resolution of the related "regarded as" issue in that case.

1. The basic definition of "disability" under the ADA is an "impairment that substantially limits one or more of the major life activities" of an individual. 42 U.S.C. 12102(2)(A). That definition does not specify whether

the existence or substantiality of the limitation should be measured with or without mitigating or ameliorative measures that the individual could take to improve his or her functioning.

The question whether mitigating or ameliorative measures should be taken into account in assessing a disability has been the subject of frequent litigation, because it is often dispositive of an ADA claim. In employment cases, for example, an individual who is found not to be disabled because mitigating measures are taken into account—and who is not disabled under the "record of disability" or "regarded as" prongs of the statutory definition—is not protected by the ADA. Even if the individual is qualified for the job, see 42 U.S.C. 12112(a), the employer discriminates against him because of his impairment, the individual poses no threat to the health or safety of anyone, see 42 U.S.C. 12113(b), and a reasonable accommodation is readily available that would permit him to do the job, the individual has no claim under the ADA.

Addressing a wide range of physical and mental impairments, the courts of appeals have divided on whether mitigating measures should be taken into account in assessing whether an individual has a disability under the ADA. The First, Second, Third, Seventh, Eighth, and Eleventh Circuits have held that mitigation is not to be considered. See *Arnold* v. *United Parcel Service, Inc.*, 136 F.3d 854, 859-866 (1st Cir. 1998) (diabetes); *Bartlett* v. *New York State Bd. of Law Examiners*, 156 F.3d 321, 329 (2d Cir. 1998) (learning disability); *Matczak* v. *Frankford Candy & Chocolate Co.*, 136 F.3d 933, 937-938 (3d Cir. 1997) (epilepsy); *Baert* v. *Euclid Beverage, Ltd.*, 149 F.3d 626, 629-630 (7th Cir. 1998) (diabetes); *Doane* v. *City of Omaha*, 115 F.3d 624, 627-628 (8th Cir. 1997) (blindness in one eye),

cert. denied, 118 S. Ct. 693 (1998); *Harris* v. *H & W Contracting Co.*, 102 F.3d 516, 520-521 (11th Cir. 1996) (Graves' disease, an endocrine disorder affecting the thyroid gland).[2] The Tenth Circuit in the instant cases and the Sixth Circuit have ruled that mitigation should be considered. See *Gilday* v. *Mecosta County*, 124 F.3d 760, 766-768 (6th Cir. 1997) (diabetes) (Kennedy, J., concurring in part and dissenting in part); *id.* at 768 (Guy, J., concurring in part and dissenting in part); see also *id.* at 761 (noting that the "opinion of the [sic] Judge Kennedy is the opinion of the court with respect to" the mitigating measures issue). The Fifth Circuit has taken a middle position, holding in a case involving a degenerative rheumatoid condition and a related kidney disease that "only serious impairments and ailments that are analogous to those mentioned in the EEOC Guidelines and legislative history—diabetes, epilepsy, and hearing impairments—will be considered in their unmitigated state." *Washington* v. *HCA Health Servs.*, 152 F.3d 464, 470-471 (5th Cir. 1998); cf. *Chandler* v. *City of Dallas*, 2 F.3d 1385, 1390 (5th Cir. 1993), cert. denied, 511 U.S. 1011 (1994).

2. In our view, the majority position on this issue in the courts of appeals is correct. Although the courts of appeals that have held that mitigating measures should be taken into account have argued that the plain terms of the Act mandate that result, see 97-1943 Pet. App. A16; *Gilday*, 124 F.3d at 766-767 (Kennedy, J.,

[2] In addition, the Ninth Circuit has recited the no-mitigation rule without significant discussion, but then ruled against the plaintiffs on other grounds. See *Holihan* v. *Lucky Stores, Inc.*, 87 F.3d 362, 364 (9th Cir. 1996), 117 S. Ct. 1349 (1997); see also *Kirkingburg* v. *Albertson's, Inc.*, 143 F.3d 1228 (9th Cir. 1998) (amblyopia ("lazy eye") may be disability, even if brain compensates for it), petition for cert. pending, No. 98-591.

concurring in part and dissenting in part), most courts have held that the terms of the Act are susceptible of either interpretation. The committee reports, however, make clear Congress's understanding that "[w]hether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids." S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989); H.R. Rep. No. 485, 101st Cong., 2d Sess., Pt. 2, at 52 (1990); see also *id.*, Pt. 3, at 28 ("The impairment should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation."). Indeed, the House Reports recounted specific examples that corroborate this understanding:

> [A] person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

Id., Pt. 2, at 52; accord *id.*, Pt. 3, at 28-29.

In addition, the agencies entrusted with administering the ADA, and whose views are entitled to deference, see *Bragdon* v. *Abbott*, 118 S. Ct. 2196, 2209 (1998), have similarly concluded that mitigating measures should not be taken into account. In promulgating regulations defining the term "substantially limits," the Equal Employment Opportunity Commission explained that "[t]he determination of whether an individual is substantially limited in a major life activity must be

made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. Pt. 1630 App. § 1630.2(j). See 42 U.S.C. 12116 (requiring EEOC to promulgate regulations "to carry out" Title I of the ADA). The Department of Justice, which is required to promulgate regulations to implement Titles II and III of the ADA, see 42 U.S.C. 12134(a), 12186(b), has also concluded that "[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services." 28 C.F.R. Pt. 35 App. A § 35.104 (preamble to Title II regulations); 28 C.F.R. Pt. 36 App. B § 36.104 (preamble to Title III regulations). These views are consistent with those of the Department of Labor, which enforces Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. 793. See *Office of Federal Contract Compliance Programs* v. *Commonwealth Aluminum*, No. 82-OFC-6, 1994 WL 59429, at *6 (Feb. 10, 1994).

3. The question whether mitigating measures should be taken into account in assessing whether an individual has a disability under the ADA is ripe for this Court's resolution. The conflict in the circuits on the issue is clear. There is no reason why an individual's rights or an employer's obligations under the ADA should depend on the fortuity of the circuit in which the individual is employed; as respondent in *Murphy* cogently states, the plight of a national employer that operates in many locations across the country is particularly difficult. See 97-1992 Br. in Opp. 4. Finally, absent review by this Court, the conflict in the circuits appears likely to endure. Although the fractured opinions in *Gilday* suggest that the Sixth Circuit's view on the issue may not yet be firm, the Tenth Circuit in

the instant cases has squarely held that mitigating measures should be taken into account in determining disability. The six circuits that have reached the opposite conclusion have similarly failed to display any indication that their views are tentative or likely to change. Accordingly, further review of this question is warranted.

4. Although *Sutton* and *Murphy* both present the question whether mitigating measures should be taken into account in determining disability, the *Murphy* case provides a better vehicle for the Court to address the issue. Few courts of appeals have addressed correctable myopia—the impairment at issue in *Sutton*—as a disability, perhaps because employers and others (at least outside a few contexts, such as the transportation industry and law enforcement) rarely discriminate on the basis of a correctable vision impairment. But, aside from the Tenth Circuit, the other courts of appeals that have addressed the issue have tended to distinguish correctable vision impairments from other impairments.

For example, the First Circuit in *Arnold* held unequivocally that disabilities are generally to be assessed under the ADA without regard to mitigating measures. See 136 F.3d at 863. The court nonetheless noted that it "might reach a different result in the case of a myopic individual whose vision is correctable with eyeglasses." 136 F.3d at 866 n.10. In the court's view, "[t]he availability of such a simple, inexpensive remedy, that can provide assured, total and relatively permanent control of all symptoms, would seem to make correctable myopia the kind of 'minor, trivial impairment[], * * * that would not be considered a disability under the ADA." *Ibid.* (quoting S. Rep. No. 116, *supra*, at 23). Those same factors seem to underlie the Fifth Circuit's

view that it "c[ould] not say whether mitigating measures such as eyeglasses or laser surgery should be considered in assessing whether an individual is disabled." *Washington* v. *HCA Health Servs.*, 152 F.3d at 471. The district court in *Sutton* similarly described myopia as a "slight shortcoming[] that [is] both minor and widely shared," 97-1943 Pet. App. A35, whose recognition as a disability would in its view "subvert[] the policies and purposes of the ADA and distort[] the class the ADA was meant to protect," *id.* at A36.

We do not agree that the analysis of a correctable vision impairment differs from the analysis of other impairments under the ADA. There are, however, features of vision impairments like myopia that set them somewhat apart from other impairments under the ADA.[3] If the Court were to grant further review in *Sutton*, therefore, it is possible that the Court's ultimate decision would turn on narrow issues about the analysis of myopia under the ADA without resolving the more general question of whether mitigating measures should be taken into account in assessing other impairments. Because hypertension—the condition at

[3] Correctable vision impairments under the ADA may present certain unique issues. In determining whether a given correctable vision impairment substantially limits the major life activity of seeing, the claimant's ability to see would have to be compared with "the condition, manner, or duration under which the *average person in the general population* can perform that same major life activity." 29 C.F.R. 1630.2(j)(1)(ii) (emphasis added). Because correctable vision impairments are so widespread, a number of issues arise regarding how to make the comparison between the claimant and "the average person in the general population" and regarding how far the claimant's vision must diverge from the "average person" before the claimant could be found to have a disability. Those issues were not addressed by the court of appeals in *Sutton* and have received little attention from other courts.

issue in *Murphy*—is far more typical of the types of impairments at issue in ADA cases, further review in *Murphy* would give the Court a better opportunity more generally to resolve the conflict in the circuits regarding whether mitigating measures should be taken into account.

The question that divides the circuits is squarely presented in *Murphy*. There is no dispute that, if a disability is to be assessed in the unmitigated state, petitioner in *Murphy* has a disability; his blood pressure is so high without medication (250/160, see 97-1992 Pet. App. 9a) that it would pose an immediate threat to his health. See 97-1992 Pet. 7. There also appears to be no dispute that, if a disability is to be assessed in its mitigated state, petitioner in *Murphy* does not have a disability. Although petitioner himself apparently claims that he has chosen to limit some activities as a result of his blood pressure, see 97-1992 Pet. App. 13a, petitioner's physician testified that petitioner's only restriction is that he should not repetitively lift weights weighing more than 200 pounds, see *id.* at 13a, 31a. The district court held that that restriction alone was insufficient to present a material issue of fact regarding whether petitioner was substantially limited in a major life activity. See *id.* at 31a. Because there is no basis to disturb that holding, the question whether petitioner has an actual disability thus turns entirely on whether his high blood pressure is to be assessed in its mitigated or unmitigated state.[4]

[4] Of course, even if the Court agreed with petitioner that he is disabled, that would not establish that petitioner can make out his ADA claim. There would remain at least the further issues that the court of appeals declined to reach: whether he was qualified for the job of mechanic at UPS and whether the DOT regulations would provide UPS with a defense. See 97-1992 Pet. App. 5a-6a.

5. The petition in *Murphy* presents three questions in addition to the question regarding mitigating measures. The second question presented concerns whether the issuance of a DOT health card to petitioner precludes respondent's claim that petitioner does not satisfy DOT health standards. 97-1992 Pet. 1. That question appears to concern the particular factual context of this case, it was not reached by the court of appeals, see 97-1992 Pet. App. 5a-6a, and it therefore does not warrant further review. The third question presented concerns whether respondent could have performed his job with reasonable accommodations. See 97-1992 Pet. i. That question does not warrant review; the court of appeals did not reach that question (because it held that petitioner was not disabled and therefore no reasonable accommodation was required), and in any event it appears to be of relevance only in the particular factual circumstances of this case.

The fourth question presented in *Murphy* concerns the court of appeals' holding that summary judgment was properly granted to respondent on petitioner's claim that respondent regarded him as disabled, under 42 U.S.C. 12102(2)(C). See 97-1992 Pet. i. Petitioner claimed that, regardless of whether he was in fact disabled, respondent regarded him as disabled when it terminated his employment, because respondent regarded him as substantially limited in the major life activity of working. The Tenth Circuit rejected that claim. The court concluded that respondent did not regard petitioner as disabled because respondent "did not base its termination of [petitioner] on an unsubstantiated fear that he would suffer a heart attack or stroke," but rather it terminated him "because his blood pressure exceeded the DOT's requirements for drivers

of commercial vehicles." 97-1992 Pet. App. 5a.[5] In the court's view, the fact that respondent viewed petitioner as unable to hold the job because of government regulatory criteria was insufficient to raise a material issue of fact as to whether respondent viewed petitioner as disabled—*i.e.*, as substantially limited,

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[5] Both courts below erred in concluding the DOT standards preclude someone with blood pressure higher than 160/90 from obtaining a commercial driver's license. See 97-1992 Pet. App. 5a, 15a-16a, 35a. A regulation issued by the Federal Highway Administration prohibits the operation of commercial motor vehicles by individuals who have "a current clinical diagnosis of high blood pressure *likely to interfere with his/her ability to operate a commercial motor vehicle safely.*" 49 C.F.R. 391.41(b)(6) (emphasis added). The regulations further provide that, when an individual is tested under that standard, "[i]f the blood pressure is consistently above 160/90 mm. Hg., further tests may be necessary to determine whether the driver is qualified to operate a commercial motor vehicle." 49 C.F.R. 391.43(f). Thus, although the general rule prohibits individuals whose high blood pressure would interfere with vehicle operation from operating commercial vehicles, blood pressure above 160/90 does not necessarily or categorically trigger that prohibition.

The district court referred to a Federal Highway Administration document entitled "Medical Advisory Criteria for Evaluation Under 49 C.F.R. Part 391.41." 97-1992 Pet. App. 15a-16a. That document recommends that no driver with blood pressure over 181/105 should be qualified to operate a motor vehicle and that drivers with blood pressure between 160/90 and 181/105 may drive for three months and then may be retested to determine whether their blood pressure has been reduced to 160/90 or below. But the document notes that its recommendations "are simply guidance established to help the medical examiner determine a driver's medical qualifications" and that "[t]he medical examiner may, but is not required to, accept the recommendations." Accordingly, this document does not absolutely preclude petitioner from obtaining a commercial driver's license.

because of his impairment, in the major life activity of working.

In our view, the court of appeals' holding on this point was a clear legal error. Regardless of whether respondent based its termination of petitioner on "unsubstantiated fear" concerning his hypertension or on a belief that, as a result of petitioner's hypertension, DOT standards precluded him from driving commercial vehicles, respondent regarded petitioner's impairment as substantially limiting his ability to work. Although the alleged failure to satisfy DOT standards could—if it were correct—assist respondent in showing that petitioner was not qualified for the job, see 42 U.S.C. 12112(a), that petitioner would "pose a direct threat to the health or safety of other individuals in the workplace," 42 U.S.C. 12113(b), or that petitioner failed a "qualification standard" that "has been shown to be job-related and consistent with business necessity," 42 U.S.C. 12113(a),[6] it does not establish or suggest that petitioner was not regarded as substantially limited in his ability to work. To the contrary, it was the very basis for respondent's decision to regard petitioner as substantially limited in his ability to work.

If the Court determines to grant review with regard to the "mitigating measures" issue in *Murphy*, the Court may well determine that review should be granted on this issue as well. It is true that, because the court of appeals' decision is unpublished, its ruling on this point does not create a cognizable conflict with any decision of any other court of appeals; indeed, most other courts to consider the effect of federal regulations

[6] See also 29 C.F.R. 1630.15(e) (recognizing defense "that a challenged action is required or necessitated by another Federal law or regulation").

on ADA claims have done so in the context of analyzing the employer's defenses, not in the context of ruling on the scope of the "regarded as" prong of the disability definition. See, *e.g.*, *Daugherty* v. *City of El Paso*, 56 F.3d 695, 697 (5th Cir. 1995), cert. denied, 516 U.S. 1172 (1996); *Prado* v. *Continental Air Transp. Co.*, 982 F. Supp. 1304, 1307 (N.D. Ill. 1997); *Campbell* v. *Federal Express Corp.*, 918 F. Supp. 912, 920 (D. Md. 1996). On the other hand, especially if this Court were to hold that petitioner is not disabled (because mitigating measures should be taken into account), respondent ought not be permitted to preclude him from a broad class of jobs on account of his high blood pressure without being held to have "regarded" him as being disabled.[7] Thus, the two issues in this case are related, such that the Court may well benefit from the opportunity to construe the "actual disability" prong of the ADA's disability definition in the somewhat broader context provided by the "regarded as" prong of that same definition. Accordingly, although this issue would not independently warrant further review, the Court may wish to grant review with respect to this question if it determines to review the issue of mitigating measures.[8]

[7] DOT certification is required for "all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce," 49 C.F.R. 390.3(a), and an inability to obtain certification thus implicates "a class of jobs or a broad range of jobs in various classes." 29 C.F.R. 1630.2(j)(3)(i).

[8] If the Court grants the petition for a writ of certiorari in *Murphy*, it may help to focus the issues by rephrasing the questions presented as we have done in this brief.

CONCLUSION

The petition for a writ of certiorari in No. 97-1992 should be granted with respect to the first and fourth questions presented. The petition for a writ of certiorari in No. 97-1943 should be held pending this Court's disposition of No. 97-1992 and then disposed of accordingly.

Respectfully submitted.

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